



April 11, 2001

Mr. William C. Bednar
712 West 14th Street
Austin, Texas 78701-1708

OR2001-1458

Dear Mr. Bednar:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 145324.

The Boling Independent School District (the "district"), which you represent, received a request for the personnel file of a named former employee, all documents relating to the hiring of the employee, all documents relating to the employee's separation from employment, and all documents stemming from any investigation of the employee by the district. You indicate the district has released to the requestor "the clearly public" responsive information. You further indicate that the named individual's college transcripts have been withheld pursuant to section 552.102(b) of the Government Code, that evaluations of the named individual have been withheld pursuant to section 21.355 of the Texas Education Code, and that student identifying information was redacted from the information pursuant to the federal Family Educational Rights and Privacy Act. You assert that the submitted information, which we have marked as exhibits 1 through 5, is excepted from public disclosure under sections 552.026, 552.101, 552.102, 552.107(1), and 552.131 of the Government Code. We have reviewed the submitted information and considered the exceptions you assert.

At the outset, you indicate that student identifying information was redacted from the documents that were released, pursuant to the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g. *See also* Gov't Code §§ 552.026, .114. Such information was also redacted from documents contained in exhibits 2, 4, and 5. In Open

Records Decision No. 634 (1995), this office concluded: (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by section 552.026 of the Act without the necessity of requesting a decision from this office, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception. Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." Open Records Decision Nos. 332 (1982), 206 (1978); *see also* 34 CFR 99.3 (defining "personally identifiable information" subject to withholding under FERPA to include "information that would make the student's identity easily traceable"). We agree that the district must withhold the information to the extent reasonable and necessary to avoid personally identifying a particular student.¹ *See also* Open Records Decision No. 673 (2001).

The district has also withheld the named individual's college transcripts, which you assert are confidential under section 552.102(b) of the Government Code. This provision excepts from required public disclosure "a transcript from an institution of higher education maintained in the personnel file of a professional public school employee" but the exception does not apply to "the degree obtained or the curriculum on [the] transcript[.]" Gov't Code § 552.102(b). Accordingly, the district may not withhold the transcripts in their entirety. Rather, the district must release to the requestor the information on the college transcripts that indicates any "degree obtained" and that discloses the individual's "curriculum." We agree that the remaining information on the named individual's college transcripts must be withheld pursuant to section 552.102(b).

The district has also withheld "evaluations" of the named individual, which you assert are confidential under section 21.355 of the Education Code. However, you did not submit any such evaluations, or representative samples thereof, to this office for review. *See* Gov't Code § 552.301(e)(1)(D). Because the district did not comply with all of the requirements of section 552.301 with respect to the information that you assert constitutes evaluations, this information is "presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information." Gov't Code § 552.302. A compelling reason sufficient to overcome the section 552.302 presumption of openness exists where the information at issue is made confidential by law. *See, e.g.,* Open Records Decision No. 150 (1977). However, because the information that you assert constitutes evaluations was not submitted for our review, we have no basis for concluding that this

¹If you have further questions as to the applicability of FERPA to information that is the subject of a request under the Act, you may consult with the United States Department of Education's Family Policy Compliance Office. *See* Open Records Decision No. 634 at 4 n.6, 8 (1995).

information is confidential under section 21.355 of the Education Code and therefore must be withheld. *See* Gov't Code § 552.352. As there has been no compelling reason sufficient to overcome the section 552.302 presumption of openness demonstrated with respect to the information you assert comprises evaluations, we have no choice but to conclude that this information must be released to the requestor. If you believe the information is confidential and cannot lawfully be released, you must challenge this decision in court as outlined below.

Next, we note that the submitted exhibits are subject to section 552.022 of the Government Code. Section 552.022(a) enumerates categories of information that are public information and not excepted from required disclosure under chapter 552 of the Government Code unless they are expressly confidential under other law. The information at issue pertains to a completed investigation by the district, and thus is subject to section 552.022(a)(1). *See* Gov't Code § 552.022(a)(1) (a completed investigation made of, for, or by a governmental body is not excepted from disclosure unless expressly confidential under other law or as provided by section 552.108). You do not assert the applicability of section 552.108. Section 552.022 therefore requires the information be released unless the information is expressly made confidential under other law.

You assert section 552.107(1) for the documents contained in exhibits 1 and 2. Section 552.107(1), which excepts information within the attorney-client privilege, is a discretionary exception under the Act and does not constitute "other law" for purposes of section 552.022. Open Records Decision No. 630 at 4 (1994) (governmental body may waive section 552.107(1)). However, the attorney-client privilege is also found in Rule 503 of the Texas Rules of Evidence. Recently, the Texas Supreme Court held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, No. 00-0453, 2001 WL 123933, at *8 (Tex. Feb. 15, 2001). Thus, we will determine whether the information in exhibits 1 and 2 is confidential under Rule 503.

Rule 503(b)(1) provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer's representative;
- (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer

or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. Tex. R. Evid. 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must 1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; 2) identify the parties involved in the communication; and 3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the document containing privileged information is confidential under Rule 503 provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.-Houston [14th Dist.] 1993, no writ). Based on your representations and our review of exhibits 1 and 2, we conclude you have demonstrated the applicability of Rule 503 to this information. Therefore, these exhibits may be withheld pursuant to the attorney-client privilege.

Information is excepted from disclosure by section 552.101 "if it is information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception includes information protected by statute. Section 261.201 of the Family Code governs release of information related to reports of child abuse or neglect. In pertinent part it reads:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

The information provided indicates that the Texas Rangers, the Wharton County Sheriff's Department, and a local prosecutor investigated or participated in an investigation of the named individual in regard to alleged child abuse. Thus, at least portions of the information apparently relate to an investigation conducted under chapter 261. You also indicate, however, that the district conducted its own investigation of the allegations. A school district is not an agency authorized to conduct a chapter 261 investigation.² See Fam. Code §§ 261.301, .3019, .406. You have not informed this office, nor are we able to fully ascertain from our review of the documents, the extent to which the information in the submitted exhibits also constitutes information that the district provided to or obtained from a law enforcement agency, for purposes of a chapter 261 investigation. To the extent that the information in the exhibits is also contained in the files of an investigation conducted under chapter 261 of the Family Code, we believe such information is made confidential by section 261.201 of the Family Code.³ We thus conclude such information must not be released to the requestor. As to any information in the exhibits that the district has *not* provided to or obtained from an investigating agency for purposes of a chapter 261 investigation, such information is not made confidential by section 261.201 of the Family Code and may only be withheld as otherwise provided herein.

With respect to exhibits 3 and 4, we understand you to assert section 552.102(a) and section 552.101 in conjunction with the common law right to privacy. Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102(a) is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101 of the Act. See *Industrial Found. v. Texas*

²Assuming the district has a police department, it does not appear from the information submitted that the district's police department conducted the district's investigation.

³You have not cited any specific rule that any investigating agency has adopted to permit release of such information to the requestor, nor are we aware of any such rule. Hence, we conclude such information must not be released. See, e.g., Open Records Decision No. 440 at 2 (1986). We have marked as subject to section 261.201 those documents, contained in exhibit 5, that the district apparently obtained from a law enforcement agency that was conducting a chapter 261 investigation. As explained above, the district must also withhold any additional documents that the district provided to an investigating agency for purposes of a chapter 261 investigation.

Indus. Accident Bd., 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Accordingly, we will consider together the section 552.101 common law privacy and section 552.102(a) claims.

For information to be protected from public disclosure by the common law right of privacy, the information must meet the criteria set out in *Industrial Foundation*. In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* at 685. We find that exhibits 3 and 4 contain information that implicates the common law right to privacy of certain individuals. Accordingly, we have marked for redaction from these exhibits the information that identifies the individuals in question. The district must redact from exhibit 3 the information we have marked. We find, however, that a legitimate public interest exists in the remaining information in exhibits 3 and 4, and that this information therefore is not excepted from disclosure by section 552.102(a) or section 552.101 in conjunction with the common law right to privacy. *See, e.g.*, Open Records Decision Nos. 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees).

As to one document contained in exhibit 5, in the event it is not confidential under section 261.201 of the Family Code as provided above, we next address your section 552.131 assertion. Section 552.131 provides as follows:

(a) "Informer" means a student or former student or an employee or former employee of a school district who has furnished a report of another person's or persons' possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.

(b) An informer's name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].

(c) Subsection (b) does not apply:

(1) if the informer is a student or former student, and the student or former student, or the legal guardian, or spouse of the student or former student consents to disclosure of the student's or former student's name; or

(2) if the informer is an employee or former employee who consents to disclosure of the employee's or former employee's name; or

(3) if the informer planned, initiated, or participated in the possible violation.

(d) Information excepted under Subsection (b) may be made available to a law enforcement agency or prosecutor for official purposes of the agency or prosecutor upon proper request made in compliance with applicable law and procedure.

(e) This section does not infringe on or impair the confidentiality of information considered to be confidential by law, whether it be constitutional, statutory, or by judicial decision, including information excepted from the requirements of Section 552.021.

Gov't Code § 552.131. Because the legislature limited the protection of section 552.131 to the identity of a person who reports a possible violation of "law," a school district that seeks to withhold information under that exception must clearly identify to this office the specific civil, criminal, or regulatory law that is alleged to have been violated. *See* Gov't Code § 552.301(e)(1)(A). Our review of the document at issue indicates an individual reported to the district alleged violations of criminal law, *i.e.* sexual assault. Because the district has raised section 552.131, we assume the individual has not consented to the release of the individual's identity. Based on this assumption, we find that the district must withhold the individual's name and information that would substantially reveal the individual's identity. We have marked the information contained in the document that is subject to section 552.131. The remaining information in the document is not excepted by section 552.131 and must be released to the requestor unless the information is otherwise excepted as provided herein.

Finally, we note that the last page of exhibit 5, if it is not confidential under section 261.201 of the Family Code as discussed above, nevertheless contains information that may be subject to required withholding under section 552.117(1) of the Government Code. Section 552.117(1) excepts from disclosure the home address, home telephone number, social security number, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the district may only withhold information under section 552.117(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. If the former employee timely elected to keep his personal information confidential, the district must withhold from the document at issue the information we have marked. The district may not withhold this information we have

marked under section 552.117 if the former employee did not make a timely election to keep the information confidential.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

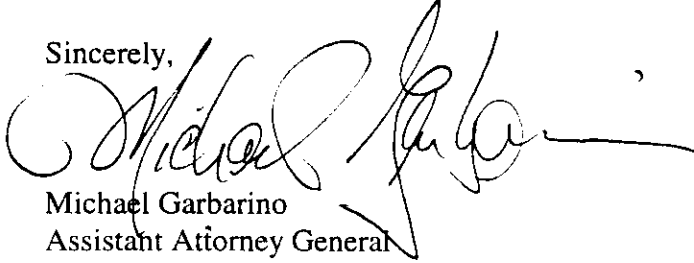
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for

contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Garbarino", with a long horizontal line extending to the right.

Michael Garbarino
Assistant Attorney General
Open Records Division

MG/seg

Ref: ID#

Encl. Submitted documents

cc: Mr. Danny Robbins
Houston Chronicle
P.O. Box 4260
Houston, Texas 77210
(w/o enclosures)